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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of

CHIBARDUN TELEPHONE COOPERATIVE, INC.  
CTC TELCOM, INC.

Petition for Preemption Pursuant to  
Section 253 of the Communications Act  
of Discriminatory Ordinances, Fees  
and Right-of-Way Practices of the  
City of Rice Lake, Wisconsin

CC Docket No. 97-219

TO: The Commission

PETITION FOR SECTION 253 PREEMPTION

CHIBARDUN TELEPHONE COOPERATIVE, INC.  
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Dated: October 10, 1997

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**SUMMARY**

Chibardun Telephone Cooperative, Inc. requests that the Commission preempt the City of Rice Lake, Wisconsin (City) pursuant to Section 253(d) of the Communications Act: (a) from refusing to grant the ministerial excavation permit necessary for construction of its proposed competitive Rice Lake telecommunications facilities, in violation of Section 253(a) of the Act; and (b) from imposing anticompetitive and discriminatory right-of-way requirements and fees upon Chibardun and other entities seeking to compete with the existing Rice Lake telecommunications monopoly, in violation of Section 253(c) of the Act. Specifically, the Commission is asked to preempt the City: (a) from insisting that Chibardun sign an onerous License Agreement as a precondition for grant of the permits; (b) from enforcing Ordinance No. 849, which restricts issuance of excavation permits for newcomers only; (c) from adopting a permanent right-of-way ordinance placing higher fees, and more stringent conditions and restrictions, upon newcomers only; and (d) from imposing anti-competitive and discriminatory costs and conditions upon Chibardun and others trying to bring competition to Rice Lake.

Over the years, the City has granted excavation permits within several days and at minimal fees to Rice Lake's existing telephone and CATV monopolies. However, it has refused to grant the permit applications submitted by Chibardun on May 20, 1997, and has already prohibited Chibardun from providing telecommunications

services in Rice Lake during late 1997 and most of 1998. Instead, the City has refused to grant permits to Chibardun until it enters a License Agreement, which would place onerous and wholly unreasonable obligations upon it, such as: (a) consent to all provisions of future City telecommunications ordinances; (b) advance public disclosure of long-term system construction plans; (c) reimbursement of "any and all" City regulatory costs; (d) indemnification of City employees and agents against any and all claims (including those for their own negligence) related in any tangential manner to the construction or operation of its system; (e) relocation or removal of facilities at its sole expense upon any City request; and (f) unlimited free City use of poles, conduits and other structures. Recently, the City adopted Ordinance No. 849, which requires prior approval for construction and relocation of the facilities of Chibardun's proposed network, but exempts excavations with respect to the facilities of the existing telecommunications and cable television monopolies.

In addition, the City's actions exceed its right to manage public rights-of-way in a competitively neutral and nondiscriminatory manner. Both the License Agreement and the Ordinance impose onerous conditions and costs (including detailed advance plans, relocation obligations, free City access and usage, administrative fees, letters of credit, indemnification obligations, and insurance coverage) upon Chibardun which are not (and have never been) imposed upon the existing Rice Lake utilities.

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TO: The Commission

PETITION FOR SECTION 253 PREEMPTION

Chibardun Telephone Cooperative, Inc. and its subsidiary CTC Telcom, Inc. (collectively, Chibardun), by their attorney and pursuant to Section 253(d) of the Communications Act, request the Commission to preempt the City of Rice Lake, Wisconsin (City) from imposing anticompetitive and discriminatory right-of-way requirements and fees upon Chibardun and other entities seeking to compete with the existing local exchange and cable television monopolies therein. The Commission is asked to preempt the City: (a) from insisting that Chibardun sign the City's proffered "License Agreement For Use Of City Rights-Of-Way" as a precondition for the City's grant of the excavation permits which Chibardun needs to construct its proposed new Rice Lake telecommunications facilities; (b) from enforcing Ordinance No. 849, which the City adopted August 26, 1997, to restrict the issuance of excavation permits for the construction of telecommunications facilities by newcomers attempting to compete with the existing Rice Lake telecommunications

monopoly; (c) from adopting and enforcing a future right-of-way ordinance placing higher fees, and more stringent conditions and restrictions upon entities seeking to compete with the City's existing telecommunications monopoly; and (d) from otherwise engaging in practices which impose anti-competitive and discriminatory costs, delays and conditions upon Chibardun and others trying to bring telecommunications competition to Rice Lake.

#### **BACKGROUND**

Chibardun is a rural telephone company headquartered in Dallas, Wisconsin. Chibardun and its predecessors-in-interest have provided telecommunications services to northwestern Wisconsin since 1907, and Chibardun itself has been organized as a Wisconsin telephone cooperative since 1957. Chibardun presently furnishes local exchange service and exchange access to six exchanges (approximately 5,500 access lines) in and around the communities of Almena, Cameron, Dallas, and Prairie Farm in Barron County, Wisconsin; and Ridgeland and Sand Creek in Dunn County, Wisconsin. A subsidiary, Chibardun Cable Television Corporation, furnishes cable television service in the same six communities (approximately 2,000 subscribers). Chibardun is presently constructing facilities to furnish competing local exchange and cable television services in the community of Barron in Barron County, Wisconsin.

The City of Rice Lake (1990 population: 7,998) is located in Barron County, Wisconsin. It is situated approximately three miles from Chibardun's Cameron exchange. The City is presently served

by a single local exchange carrier (GTE North, Inc.) and a single cable television operator (Marcus Cable, Inc.).

Chibardun presently provides products and services such as business phone systems, security systems, Internet connections, pagers and cellular phones to customers in Rice Lake. Its contacts and discussions with Rice Lake businesses and residents have convinced Chibardun that a substantial portion of local customers would take local exchange and/or cable television service from Chibardun if and when it enters the Rice Lake market.

After passage of the Telecommunications Act of 1996 (1996 Act), Chibardun explored the new opportunities for providing competitive local exchange and cable television services in Barron and Rice Lake. A market survey conducted in early 1997 found that approximately 50 percent of Barron and Rice Lake respondents would be "interested" or "very interested" in taking local exchange service and/or cable television service from Chibardun.

In March, 1997, Chibardun representatives met with Rice Lake City Administrator Curtis E. Snyder to inform him of Chibardun's desire to provide competitive local exchange and cable television services in Rice Lake, and to determine what local steps needed to be taken in this regard. Mr. Snyder furnished Chibardun with a copy of the city's cable television franchise ordinance, and indicated that Chibardun would need to contact the Rice Lake Cable Commission to obtain a franchise.

On April 5, 1997, Chibardun held its annual cooperative meeting, and announced plans to construct and operate competitive

telecommunications systems in Barron and Rice Lake. In addition to local exchange and cable television services, Chibardun's proposed new Barron and Rice Lake operations will provide long distance services, 800 numbers, calling cards, Internet access, telephone equipment sales and service, wide-area paging, cellular telephone sales and service, fire and security systems, video conferencing, local area network wiring, public address systems, voice mail, specialty needs equipment and telecommunications consulting.

Chibardun's Barron project has encountered no interference or delays from the City of Barron's government, and has been treated by Barron officials in the competitively neutral and nondiscriminatory manner contemplated by Congress when it adopted Section 253 in the 1996 Act. The required right-of-way permits were issued by the City of Barron on the same terms applicable to existing utilities in July, 1997, and the necessary cable television franchise also was issued in July, 1997. Chibardun commenced construction of its new Barron facilities in July, 1997, and expects to complete construction in November, 1997. It plans to begin offering local exchange service and cable television service to Barron customers in November, 1997.

In contrast, Chibardun's Rice Lake project has encountered little but resistance and delays from the City's government. As a result, Chibardun already has been prohibited from providing telecommunications services in Rice Lake during late 1997 and most of 1998. Moreover, the City's ongoing resistance and delays are



likely to have the effect of prohibiting Chibardun from providing telecommunications service in Rice Lake on a long-term or permanent basis.

Chibardun first encountered problems with the City in the cable television sector. However, these problems quickly grew and expanded to prevent construction of its proposed Rice Lake telecommunications facilities as well as its proposed Rice Lake cable television system.

Chibardun met with the Rice Lake Cable Commission on April 15, 1997, April 23, 1997, and April 29, 1997, to discuss the terms and conditions of a cable television franchise. Chibardun proposed to accept the terms and conditions of the 15-year franchise granted by the City to WFRV Television, Inc. (and later transferred to Marcus Cable), with two minor exceptions concerning: (a) the specification of a three-year period for build-out of the new cable system; and (b) the location of Chibardun's cable office approximately three miles away in Cameron. The scope of discussion during all three meetings was limited by the presence of three Marcus Cable representatives. Chibardun discussed its cable television plans in general terms, but requested closed sessions or non-disclosure agreements before disclosing proprietary aspects of its plans. These requests for confidentiality were met with threats of litigation by Marcus Cable. After lengthy discussions, the Cable Commission declined to adopt procedures to assure the confidentiality of Chibardun's proprietary information, and also refused to complete and recommend a franchise for Chibardun.

Instead, the Cable Commission sent Chibardun's cable television proposals to the Rice Lake City Council with no recommendation.

At its May 13, 1997 meeting, the Rice Lake City Council considered the Chibardun cable television proposals. Chibardun explained the general aspects of its planned cable television system and service, agreed to establish and maintain a Rice Lake office, and requested a single change in the terms of the cable ordinance granted to Marcus Cable's predecessor (to allow Chibardun three years to complete construction of its cable system within all portions of Rice Lake). Marcus Cable representatives then passed out a letter to the City Administrator demanding that the terms and conditions of any Chibardun cable franchise be "identical" to those in Marcus Cable's existing franchise. The Marcus Cable letter asserted: (a) that Chibardun's request for a three-year build-out period should be rejected (apparently because Marcus Cable had acquired its existing system fully constructed from the preceding franchisee); and (b) that action upon Chibardun's franchise request should be delayed pending completion of Marcus Cable's renewal franchise for the period commencing in 2001, or that Chibardun should be granted only a four-year franchise to 2001 (when Marcus Cable's existing 15-year franchise expires). Mick Givens, the Rice Lake Cable Director (and a former Marcus Cable employee), stated that Chibardun's franchise should expire at the same time as Marcus Cable's franchise in 2001, and that grant of a fifteen-year franchise to Chibardun would not be "fair" to Marcus Cable. Mr. Givens expanded the scope of discussion from cable television to

telecommunications in general, and distributed a sample ordinance from the City of Madison, Wisconsin dealing with rights-of-way. At the end of the discussion, the City Council declined to adopt Chibardun's proposed Rice Lake cable franchise, and instead voted to hire Barry Orton, a Professor of Communications at the University of Wisconsin, to draft a new Rice Lake telecommunications ordinance and to advise the City Council on a course of action.

Sections 6-2-3 and 6-2-4 of the Rice Lake Code (Exhibit A) require excavation permits for underground construction of telecommunications, cable television and other public utility facilities, and set forth the fees, insurance coverage, notice, resurfacing and other requirements applicable to such excavation permits. These provisions have long been the only City right-of-way requirements applicable to GTE and Marcus Cable.

On May 14, 1997, employees of Chibardun's engineering consultant met with Rice Lake Street Commissioner Gary Nueman to discuss the forms and procedures needed to obtain the excavation permits necessary to construct Chibardun's proposed telecommunications and cable television facilities. Mr. Nueman described and provided the requisite application forms. The general tenor of the meeting was that the processing and grant of excavation permits for public utility construction was a relatively simple and straightforward matter, and that virtually all applications were "rubber stamped" as granted shortly after they were filed. In fact, Mr. Nueman noted that Marcus Cable had "many times" applied for and received excavation permits after it had completed the construction for

which such permits were required.

The routine and ministerial nature of the processing of Rice Lake excavation permits is evidenced by the attached Permit Number 1780 issued by the City to GTE (Exhibit B). GTE signed and submitted its application for the permit on November 1, 1996, and received a grant thereof five days later on November 6, 1996, for construction (apparently commenced before grant) to be completed the very next day on November 7, 1996. It is further notable that the sole cost of the permit to GTE appears to be a minimal permit fee in the amount of ten dollars (\$10.00).

On May 20, 1997, Chibardun submitted applications for excavation permits to the Rice Lake Street Commissioner. It is Chibardun's information and belief that these applications were in good order, but that the Street Commissioner was instructed not to grant them. These applications remain pending to this date, and Chibardun has not been able to obtain any official explanation regarding their status or the reasons for the lengthy, four and one-half month (and counting) processing delay.

On May 23, 1997, Rick Vergin, Chibardun's General Manager, met with the City Administrator and Cable Director to try to resolve the excavation permit and cable franchise problems. He was made aware that little or nothing could be resolved until the future Rice Lake telecommunications ordinance was completed and adopted. The City Administrator noted during this meeting that the telecommunications ordinance was being developed because Chibardun wanted to come to the City.

Also on May 23, 1997, Chibardun received a letter from the City Administrator requesting "further information" regarding its proposed telecommunications and cable television systems (Exhibit C). The telecommunications portion of the letter requested: (a) a description of the proposed network; (b) a construction timetable; (c) a statement of the projected service dates; (d) a statement regarding the nature of the telecommunications services to be provided, operating territory and proposed charges; (e) evidence that Chibardun has obtained the requisite approvals from the Public Service Commission of Wisconsin (WPSC); and (f) a statement regarding the need to negotiate an interconnection agreement with GTE.

By letter of May 23, 1997 (Exhibit D), Chibardun responded to the City Administrator. Chibardun asserted that it had a right to the same prompt grant of excavation permits that GTE, Marcus Cable and other utilities historically had enjoyed, and that such permits could not lawfully be subjected to terms, conditions, occupancy fees and processing delays procedures different and more onerous than those imposed by the upon other utilities. It stated that the City's request for substantial information regarding services, rates, operating territory, state approvals and interconnection arrangements bore no relevance to the City's management of rights-of-way. Rather, such intrusions into the jurisdiction of the Commission and the WPSC appeared to be attempts to impose entry barriers in violation of Section 253 of the Act.

On May 27, 1997, Chibardun appeared before the Rice Lake City Council to request that its excavation permits be granted. It

emphasized that further processing delays would preclude the completion of arrangements for construction of its new telecommunications and cable television facilities before the onset of the 1997-1998 Wisconsin winter. During this open meeting, City Administrator Snyder reiterated his earlier statement that the future Rice Lake telecommunications ordinance was being developed because Chibardun wanted to come to the City. The City Council declined to order the grant and issuance of Chibardun's excavation permits, and deferred the matter pending development of the telecommunications ordinance.

On June 7, 1997, the City delivered to Chibardun a proposed "License Agreement For Use Of City Rights-Of-Way" (Exhibit E) to govern the construction, maintenance and operation of Chibardun's proposed telecommunications network until a telecommunications ordinance is adopted. The City never has required GTE or Marcus Cable to enter into identical or similar agreements with respect to their past, present or future construction projects. Rather, Chibardun is the only entity that ever has been required by the City to enter into such an agreement as a precondition for the grant of excavation permits.

Among other things, the proffered License Agreement would impose the following conditions and obligations upon Chibardun that have not been imposed upon GTE and/or Marcus Cable: (a) the submission of a complete construction plan and schedule before commencement of construction of any part of Chibardun's telecommunications network (Section 9.a); (b) the submission of a

list of all independent contractors to be employed to work on the construction of the Chibardun telecommunications network (Section 9.b); (c) the obligation for Chibardun to relocate or remove its telecommunications network, at its own expense, from any right-of-way at the request of the City (Section 12); (d) the obligation for Chibardun to allow the City to use poles, conduits and other structures free of charge (Section 13); (e) the obligation for Chibardun to pay the City an "administrative fee" of \$10,000 for the drafting and processing of the License Agreement (Section 14); (f) the unlimited obligation for Chibardun to reimburse the City for "any and all" costs the City incurs for review, inspection or supervision of Chibardun's activities under the License Agreement or under "any other ordinances" for which a permit fee is not established; (g) the commitment in advance for Chibardun to comply with any and all provisions that might be included in the future Rice Lake telecommunications ordinance, including any future right-of-way occupancy fee provisions (Section 15); (h) the obligation for Chibardun to obtain the City's prior written approval of the sale of its facilities to another telecommunications provider (Section 17); (i) the provision by Chibardun to the City of an irrevocable letter of credit in the amount of \$50,000 to ensure performance of all of Chibardun's obligations (Section 18); (j) the indemnification by Chibardun of not only the City but also a much broader group of officials and agents for a much broader range of activities (including alleged injury from exposure to electromagnetic fields) than the normal Section 6-2-4(c)(2) indemnity

provision (Section 19); and (k) the imposition upon Chibardun of far greater and more expensive insurance obligations than those required by Section 6-2-3(c) (Section 20). In other words, the License Agreement would require Chibardun to pay the City a far greater amount than GTE or Marcus Cable for far more narrow and tenuous rights-of-way; would force Chibardun make public (including to GTE and Marcus Cable) its construction plans and contractors well in advance of actual construction; and would give the City a virtually unlimited right to impose additional fees, expenses and obligations upon Chibardun at a later date.

Chibardun has refused to sign the proposed License Agreement, and has not received grant of its requested excavation permits. In early June, 1997, it determined that there was not enough time to finalize construction arrangements and complete substantial construction before the onset of cold weather. Therefore, it suspended its Rice Lake construction plans for 1997.

By letter of August 11, 1997 (Exhibit F), Chibardun notified the City Administrator that it had become aware that the City was about to adopt a new right-of-way ordinance. It asked for a copy of the proposed ordinance, and requested to be informed when it would be open for public comment.

On August 13, 1997, the City Administrator telephoned Chibardun's General Manager and left a message that Chibardun would be sent a copy of the ordinance when it was available in draft form, and that Chibardun and the other utilities would then have an opportunity to speak regarding it.



In point of fact, Rice Lake Ordinance No. 849 (Exhibit G) already had been presented and discussed at a City Council meeting the previous evening (August 12, 1997). It was read a second time and enacted on August 26, 1997.

Ordinance No. 849 is directed solely at Chibardun and other potential competitors of GTE and Marcus Cable. Section 2 indicates that it applies to facilities "with a project value of \$50,000 or more" (i.e., Chibardun's proposed new facilities), while Section 3 expressly exempts "repair and maintenance work associated with existing equipment and facilities" (i.e., those of GTE and Marcus Cable). While exempting GTE and Marcus Cable, the Ordinance sets the stage for imposition upon potential competitors such as Chibardun of requirements extending far beyond normal right-of-way considerations to environmental, economic, infrastructure, safety and health matters.

In sharp contrast to the hostility of some portions of the City government, Chibardun has been encouraged by many Rice Lake residents and businesses not to give up its effort to provide them with new telecommunications and cable television service options.

### **ARGUMENT**

#### **I**

#### **The City Has Prohibited Chibardun From Providing Telecommunications Service In Rice Lake**

Section 253(a) of the Communications Act declares that "[n]o state or local statute or regulation, or other state or local requirement, may prohibit, or have the effect of prohibiting the

ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a).

The competing local exchange and exchange access services which Chibardun desires to offer in Rice Lake are "telecommunications services" within the meaning of Section 3(46) of the Communications Act. That is, they comprise "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 153(46).

The City's refusal to grant Chibardun the excavation permits necessary to construct its proposed Rice Lake telecommunications facilities already has prohibited Chibardun from providing local exchange and exchange access services in Rice Lake during 1997 and most of 1998. If the City continues to refuse to grant Chibardun's excavation permit applications or to require Chibardun to consent to onerous and discriminatory conditions as a precondition for grant, the City will prohibit (or have the effect of prohibiting) Chibardun from providing its proposed telecommunications services during subsequent time periods.

To date, the City has offered no explanation why it has prohibited its Street Commissioner since May, 1997 from performing what had previously been the routine and ministerial act of "rubber stamping" as granted the excavation permit applications of existing Rice Lake utilities within a few days after their filing. As regards the existing Rice Lake utilities, the City's excavation permit process has been so loose and informal that GTE and Marcus

Cable appear frequently to have sought and obtained excavation permits **after** beginning or even after completing the construction which they purported to authorize.

The City's proffer of the License Agreement (Exhibit E) to Chibardun as a precondition for grant of the excavation permits does not alleviate or excuse its blocking of Chibardun's entry into the Rice Lake market. The obligations that the City has tried to impose upon Chibardun under the License Agreement are so onerous -- both by themselves and compared to the obligations imposed upon GTE and Marcus Cable by the existing Rice Lake Code -- that no rational entity could consent to them.

1. First, no reasonable entity could agree to comply, sight unseen, with the provisions of a future telecommunications ordinance to be drafted and adopted at a future date by a City government -- particularly one that has shown little but hostility to its prior efforts and proposals. Chibardun will not give up its right to oppose, appeal and/or seek preemption of any anticompetitive and discriminatory provisions included in future Rice Lake ordinances.
2. Second, no reasonable entity could agree to reveal its system construction plans, schedules and contractors in a public document available for inspection by its entrenched telephone and cable television competitors far in advance of its planned construction and commencement of operations. For years, the City has required little

or no advance notice from GTE or Marcus Cable regarding their construction projects. Chibardun should not be required to furnish long-term scheduling information that would allow GTE and Marcus Cable to focus their construction and marketing efforts in a manner best designed to anticipate and counteract Chibardun's plans and/or to tie up Chibardun's prospective contractors at the time they are scheduled to work on the proposed new system.

3. Third, no reasonable entity could agree to reimburse the City for "any and all" costs the City incurs to review, inspect or supervise its activities. The City has not required GTE or Marcus Cable to give a similar unlimited "blank check" for reimbursement of costs incurred in the regulation of their activities.
4. Fourth, no reasonable entity could consent to indemnify not only the City but also the City's employees, agents, contractors and attorneys against any and all claims and liabilities related in any tangential manner to the construction or operation of its system, including claims arising from the negligence of those very City employees, agents, contractors and attorneys and/or relating to exposure to electromagnetic fields or radio frequencies. Section 6-2-4(c)(2) of the Rice Lake Code requires GTE and Marcus Cable to indemnify the City only against liability for damages caused by the negligence of the

utilities and utility employees during the course of actual construction activities.

5. Fifth, no reasonable entity could agree to relocate or remove its facilities, at its sole expense, from rights-of-way at any time and for any reason that the City requests. Chibardun will not give up the right to negotiate the nature and timing of network modifications requested by the City, and to seek judicial or agency relief from unreasonable requests.
6. Finally, no reasonable entity could agree to give the City unlimited free use of its poles, conduits and other structures. To the extent that the provision to the City of free use of poles and conduits is appropriate under federal and state law, Chibardun must retain the right to limit the nature and amount of such use in order to preserve capacity for the operation and growth of its own network.

Ordinance No. 849 (Exhibit G) leaves the present impasse in place. Whereas Section 3 exempts "repair and maintenance work associated with existing equipment and facilities" (that is, construction by GTE and Marcus Cable), Section 2 requires the prior approval of the City Council or the Superintendent of Streets for construction, installation, removal or relocation of any equipment or facilities with a project value of \$50,000 or more (that is, Chibardun's proposed network).

In Classic Telephone, Inc., FCC 97-335, released September 24,

1997, at para. 28, the Commission noted its "serious concerns about the potential adverse effect on the development of local exchange competition caused by unreasonable delay by local governments in processing franchise applications and other permits." It stated that "in certain circumstances a failure by a local government to process a franchise application may 'have the effect of prohibiting' the ability of the applicant to provide telecommunications service, in contravention of section 253." Id.

Here, the City's continuing refusal to process and grant Chibardun's May 20, 1997 excavation permit applications for more than four months (normal processing time: less than one week) has prevented Chibardun from constructing its proposed network and providing telecommunications services in Rice Lake during late 1997 and most of 1998. With no resolution in sight and with the probability that the planned future Rice Lake telecommunications ordinance will incorporate some or all of the onerous and discriminatory provisions of the License Agreement (Exhibit E), it appears that the delays will extend into late 1998 and beyond. Hence, the City's actions have prohibited, and continue to have the effect of prohibiting, the ability of Chibardun to provide interstate and intrastate telecommunications services in Rice Lake, in violation of Section 253(a) of the Communications Act.

## II

**The City's Actions Exceed  
Its Right To Manage Public Rights-Of-Way  
In A Competitively Neutral And Nondiscriminatory Manner**

Section 253(c) of the Communications Act allows state and local governments to manage the public rights-of-way and to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis.

Section 253(c) is intended to permit "state and local legal requirements that: (1) regulate the time or location of excavation to preserve effective traffic flow, prevent hazardous road conditions, or minimize notice impacts; (2) require a company to place its facilities underground, rather than overhead, consistent with the requirements imposed on other utility companies; (3) require a company to pay fees to recover an appropriate share of the increased street repair and paving costs that result from repeated excavation; (4) enforce local zoning regulations; and (5) require a company to indemnify the City against any claims of injury arising from the company's excavation." Classic Telephone, Inc., 11 FCC Rcd 13082, 13103 (1996). It is **not** intended to allow local governments to reach beyond traditional rights-of-way matters in order to impose a redundant "third tier" of telecommunications regulation on top of traditional federal and state regulation. TCI Cablevision Of Oakland County, Inc., FCC 97-331, released September 19, 1997, at para. 105; Classic Telephone, Inc., FCC 97-335, at para. 34.

The City has attempted to go beyond its traditional right-of-way management responsibilities to establish this impermissible "third tier" of regulation. The City Administrator's May 23, 1997 letter (Exhibit C) requested further information regarding "third tier" matters such as: (a) a statement regarding the nature of the telecommunications services to be provided, operating territory and proposed charges; (b) evidence that Chibardun has obtained the requisite approvals from the WPSC; and (c) a statement regarding the need to negotiate an interconnection agreement with GTE. The License Agreement (Exhibit E) requires Chibardun, inter alia, to obtain the City's prior written approval of the sale of its facilities to another telecommunications provider (Section 17 thereof).

In addition, the City has sought to impose its regulatory and compensation requirements in a manner which discriminates against the new entrant Chibardun and impairs its ability to compete against the established GTE and Marcus Cable operations.

The Commission has recently stated that the "[o]ne clear message from section 253 is that when a local government chooses to exercise its authority to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, it must do so on a competitively neutral and nondiscriminatory basis. Local requirements imposed only on the operations of new entrants and not on existing operations of incumbents are quite likely to be neither competitively neutral nor nondiscriminatory." TCI Cablevision of Oakland County, supra at para. 108.



Here, the City has imposed Ordinance No. 849 (Exhibit G) only on new entrants like Chibardun, while exempting the existing facilities and equipment of the incumbents GTE and Marcus Cable from its reach. Likewise, the City Administrator has stated publicly and privately that the reason why the Rice Lake telecommunications ordinance was being developed was that Chibardun wanted to come to the City.

Moreover, as noted above, the City's License Agreement (Exhibit E) is anticompetitive and discriminatory because it imposes far more onerous and expensive obligations upon Chibardun than existing Sections 6-2-3 and 6-2-4 of the Rice Lake Code impose upon GTE or Marcus Cable. For example:

1. Chibardun must submit a complete construction plan and schedule and list of its independent contractor before commencing construction of any part of its network (Sections 9.a and b). In contrast, GTE and Marcus Cable need only obtain an excavation permit before initiating a particular street opening or excavation [Section 6-2-3(a) and (e)]. In fact, GTE and Marcus Cable appear regularly to be permitted to dig up right-of-ways first and obtain the applicable permits later.
2. Chibardun must relocate or remove its telecommunications network, at its own expense, from any right-of-way at the request of the City (Section 12). In contrast, the Rice Lake Code places no comparable obligation upon GTE.